FLORIDA TOMATO EXCHANGE

"A Nonprofit Agricultural Cooperative Association"

February 12, 2003

Via Facsimile (202) 720-3499

Country of Origin Labeling Program
Agricultural Marketing Service
U.S. Department of Agriculture
Stop 0249, Room 2092-S
1400 Independence Avenue, SW
Washington, DC 20250-0249

Re: Notice of Request for Emergency Approval of a New Information Collection, 67 Fed. Reg. 70205, November 21, 2002

Dear Sir/Madam:

These comments are filed in response to the Notice referred to above in which the U.S. Department of Agriculture (the Department or USDA) requests the Office of Management and Budget (OMB) to grant emergency approval for information collection from individuals and entities in connection with recordkeeping obligations to enforce country of origin labeling guidelines pursuant to the Paperwork Reduction Act of 1995. The comment period was extended by the Department until February 21, 2003.

Introduction

The Florida Tomato Exchange is opposed to granting the request for approval of USDA's request. We believe the request in unneeded at this time because no one is participating in the interim period, and is unwarranted because it is based on unsupported and/or overstated assumptions. Further, we believe USDA seeks information from individuals and entities that are not covered by the labeling provisions of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171) (the Act). In addition, we believe USDA overreaches in attempting to require recordkeeping of many in the perishable industry because the Act requires suppliers of retailers to supply information to retailers. The Act does not require suppliers to maintain records. However, most, if not all, suppliers in the produce already maintain records sufficient to show the origin of the covered perishable commodity. USDA ignores the benefits of the labeling and fails to acknowledge that Congress in passing this law determined that the benefits to consumers outweigh the burdens to the retailers in labeling. And, lastly, USDA should acknowledge and consider the effect of FDA's proposed bio-terrorism regulations on its Notice. It appears to us that FDA will require most facilities that handle food to register with FDA and keep records for 2 years on the immediate previous source and subsequent source of the food items used by that facility. In our view, FDA's proposed regulations

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supercede and fully cover the requirements of the labeling law and therefore, the Notice should be withdrawn.

In light of the foregoing, we ask that OMB deny USDA's request for new collection because it: unfairly burdens individuals and entities in the produce industry contrary to the Paperwork Reduction Act; requires the creation of documents from those in the produce industry that are specifically excluded from coverage, *viz.*, those who do not supply retailers. In addition, many, if not all, of those in the produce industry, even if covered by the labeling law, already are required to maintain records identifying the origin of the produce they grow, purchase, or sell pursuant for example to state laws (Florida), or to Federal laws (19 U.S.C. § 1304). Further, many commodities already are labeled at retail.

Moreover, USDA is wrong in concluding that an elaborate recordkeeping system for the entire industry is essential for country of origin labeling for retailers. We do not believe the law mandates this conclusion and no evidence has been presented to support such a conclusion.

The Labeling Act

The Act requires that a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity. The retailers can use a label, stamp, placard, etc. If it is already labeled as many perishable commodities already are, then the retailer need do nothing at all. In the proposal, USDA fails to account for how much produce is already labeled at retail or is already labeled as to its country of origin when its is delivered to retailers. For tomatoes from Florida all containers of tomatoes that are shipped from Florida are labeled as product of America or product of USA.

The Act further states that the Secretary may require any person who handles, stores, or distributes a covered commodity for retail sale maintain a verifiable recordkeeping audit trail to permit the Secretary to verify compliance. Again, the proposal fails to exclude many shipments not destined for retail sale. We believe the provision stated in the first sentence of this proposal gives the Secretary the discretion to impose a recordkeeping system or not; but, if she does, it may only covers those who handle, store, or distribute a covered commodity for retail sale. The law is clear on this point but the proposal seeks to cover everyone in the produce industry. We believe that is wrong, and we believe the law as written at most seeks only a limited system of recordkeeping and that the recordkeeping burden shall be placed only on retailers and the retailers' immediate suppliers. USDA makes no attempt to distinguish between those who supply produce to retailers and those who don't. Nor does USDA consider the information/records already in existence in the produce industry. We urge the Secretary use her discretion and not adopt the system proposal. For produce, the Department

should not adopt any recordkeeping system because such records are not required to be maintained, but, in any case, are already maintained.

Simply stated, the Act has two requirements: (1) the retailer is required to label at retail, and (2) the person supplying the retailer shall provide country of origin labeling information to the retailer. More fundamentally, however, we are concerned about USDA's effort to develop a system that it states is essential to the integrity of the system. We believe such a system is unnecessary and not even required. There is no need, much less a compelling need, to impose such a burdensome system. Under the Act, the retailer must identify the country of origin to its customer and the retailer's supplier must give the retailer information as to the country of origin it is supplying. There is really no need for an audit system. If USDA has a concern a retailer incorrectly labeled a covered commodity, USDA can look at the retailer's records to determine if a violation of the Act occurred. If the retailer's supplier has provided incorrect information to the retailer, USDA can review the supplier's documentation. In either case, it is not necessary to mandate an audit system for the entire produce industry. In the produce industry, the records exist now with the retailer and its supplier. That should be enough.

If any system is to be imposed, it should be limited in scope and burden. For produce, such a system should incorporate fully the paperwork requirements already imposed by USDA itself under PACA or the U.S. Customs Service which involves certificates of origin. We believe the U.S. Customs system requires all imported produce sent to retailers in bulk or repackaged to be labeled at least to the backroom of the retail establishment and the records indicating the country of origin are required to be maintained. For domestic produce supplied to retailers, we believe, for the most part, the origin of the produce is known to the retailer and the paperwork already is maintained. For the produce that is supplied to retailers and is not so labeled now, a simple certification process as is used by the Customs Service easily could be modified to fulfill the Act's requirements. But, again, we believe the Secretary is not required to put in place such an elaborate system at this time and we do not believe she should. Further, it is clear to us that with such a system as proposed, USDA will not be able to enforce the system. Right now, there is no provision for anyone to enforce the labeling law and no money to do so. In our opinion, enforcement will default to the staff that enforces the Perishable Agricultural Commodities Act (PACA). We firmly believe they do not have the staff to enforce such an elaborate system. They barely have enough staff to enforce PACA and, in any case, the monies used to fund the PACA staff are to be used for enforcement of PACA, not this law.

Accordingly, the Secretary needs to rethink the mandate of the labeling law which is to require retailers to label produce as to its country of origin and to provide a much simpler system of enforcement and recordkeeping for retailers and their suppliers. We strongly urge the Secretary to limit the recordkeeping to the retailers and the existing records of their suppliers for the time being. Instead of sending investigators out across

the country periodically to check on recordkeeping violations we urge the Department to adopt a system, like PACA, that acts on complaints of violations of the law. We think that is what Congress wanted. Further, we see no need for a nationwide audit system that will not guarantee country of origin labeling at retail. A simple complaint system that provides credible and verifiable information to the Department as to the violation of the country of origin law is all that is needed at this time. We do not need a costly, elaborate audit trail scheme for which there is no money and no mandate.

The Act does note that information on the country must be supplied by the supplier of the retailer to the retailer. As noted above, we believe the supplier of the retailer means just that: the person that directly supplies the covered commodity to the retailer. The subject proposal greatly expands the supplier category to include all who might at some time in the future supply a retailer. This is not what the plain language of the law says, and the proposal sweeps in many who, by definition, are simply not covered by the Act. In doing so, the Department has not only exceeded its authority, but also it has grossly overestimated to cost of the proposed audit trail system.

The Act specifically states that the Secretary shall not use a mandatory identification system. We support the idea of flexibility in labeling and the retailer should be free of restrictions in labeling. All that is necessary is that consumers are told the country of origin of the produce they wish to buy. The Act further states that the Secretary may use as a model certain certification programs already in place. As noted above, for produce we believe the U.S. Customs certification program and the PACA complaint program should be adopted and the analysis for a labeling program should consider only what is needed by those covered by the Act using this program. We believe using these programs will substantially reduce the cost of the program.

Regarding enforcement, it must be noted that enforcement of the labeling law is limited to retailers only, and only against them for willful violating the law; and even then, only after receiving a warning and are permitted 30 days to comply with the law. If suppliers provide incorrect labeling information to retailers they will be in violation of the PACA. There is no enforcement provision in the Act directed to any recordkeeping violations. Against this background, it appears inappropriate to establish an elaborate, burdensome system that cannot be enforced against many in the industry. The Secretary is not required to impose this system, and the Secretary is directed not to use a mandatory identification or record keeping program. Again, we strongly urge the Department to abandon the proposed system and use the record keeping systems already in place, the PACA system, the Customs Service's certification system, the FDA system, or a combination of them. We also urge USDA to adopt the PACA complaint system for enforcing the law against retailers.

It is telling to note that no retailer has determined to follow the voluntary guidelines. In fact, because no one is using the interim voluntary program, the subject

proposal for collection of information for this voluntary labeling program should be withdrawn as moot. The guidelines have been out for months now and not one has come forward to try to follow the guidelines.

Also, it must be noted that when the program starts, it is a certainty the retailers will demand accurate labeling information from their suppliers so as to be in compliance with the labeling law; and, if they don't get it, they will most likely find other suppliers. There is no doubt in our mind that the retailers will make this program work efficiently and economically. And, it is a fact, as was envisioned by everyone in the food industry, that the consumer will bear the cost of the program. Consumer groups supported the adoption of the law, know of is costs, and have said many times that they are willing to bear the costs. Notwithstanding that the proposal does not address the benefits of the program, the fact that consumers overwhelmingly supported labeling legislation is a clear indication that the benefits to consumers outweigh the reasonable costs of implementing the law.

The proposal estimates the number of entities likely to participate in the voluntary program and estimated that all industry members that could be affected by the mandatory program will participate in the voluntary program. We believe this estimate is wrong as a matter of fact. No one is participating in the program. This raises a larger issue as well. The magnitude of the cost estimates coupled with other factors like the possibility of losing one's PACA license combine to make this proposal particularly threatening to use for many in the industry. Most producers in the industry support country of origin labeling but they do not support a government program that costs billions of dollars, employs an audit system that is intrusive and burdensome, and seeks to expand its authority beyond the language of the Act. Something is amiss in the program and in the way the program has been presented. It is not too late to reconsider how the program should work. It should be understood that we and many others do not think this is the way it should be done. The labeling program needs to focus on the retail level and those that supply the retail level. It needs to be simple. It does not need an audit trail system. It needs to use systems in place like the Customs Service certification program and the PACA. Certainly, the Secretary should consider the labeling program employed in the State of Florida. The costs of labeling for the retailer in Florida are minimal and, in any case, are passed onto the consumer. More importantly, it has worked well since 1979 without an audit trail system.

The Department needs to meet with affected parties of each of the covered commodities to determine how this program can be implemented to get the job done efficiently and economically. This proposal does not do that, and it appears it was designed to have the exact opposite effect: create a program, make it large, and costly, ignore the language of the law and the systems already in place, determine that the law covers everyone in the industry, and establish a voluntary program that makes it so difficult that no one will participate. This is where we are now. For the fruit and

vegetable industry we are incredulous that the Department hasn't determined that the labeling system can work with no additional information collection burdens, with the Customs Service's certification program, with PACA enforcement, etc. The producers' burden is estimated at $1 Billion. We think this number is wrong by close to $1 Billion. We believe the handlers and the retailers will have similar concerns.

Conclusion

In summary, if the proposal seeks comments on anything having to do with the voluntary program, then it should be withdrawn as the voluntary, interim program is unused. The proposal seeks comments on the accuracy of the estimates of burden, methodology and assumptions and we have done so herein. We do not understand how AMS can say that they don't believe that records pertaining to country of origin are maintained by affected parties. They are for the produce industry and they are required to be kept for 2 years. We do not agree with AMS that everyone back to the point of production must keep records.

The proposal seeks comments on ways to enhance the quality, utility, and clarity of the records sought to be kept. We believe most, if not all, of the records needed to identify the country of origin are now in existence in the fruit and vegetable industry and the retailers and suppliers of retailers should be free to use whatever record(s) they have (or need to create) to show they are complying with the Act. We have made suggestions on these points elsewhere herein. The Department uses numbers like 31,143 retail outlets, but this number is overstated or at least misleading. There are only 16,000 total PACA licensees, so the retailers must be fewer than the number used, and in any case, retailers should be allowed to maintain labeling records in a central location, thereby further lowering the number and the burden. And, we again object strenuously with the conclusion reached without any supporting documentation that an audit trail system must be employed. It does not, and the Secretary has and should use her discretion to abandon this unsupported and unnecessary audit program.

The proposal estimates that all farms will implement the system. This is wrong because the law does not cover all farms, and for produce growers that may be covered by the law, to the best of our knowledge, there will be no cost to implement this program. They already maintain records that indicate the country of origin. Again, we note for the record that many farmers do not supply produce to retailers as defined in the law. The Department made no attempt to determine what farmers are covered by the law and which farmers are exempted. Accordingly, estimates of the burden on farmers is inaccurate.

We suggest this proposal fails to provide any support that the proposal minimizes the Federal paperwork burden for individuals, small businesses, and State governments. It provides no support that the proposal minimizes the cost to the Federal government of

collecting, maintaining, using, and disseminating information. In fact, the proposal provides no information that the Department has the personnel or money to implement the labeling law. While the proposal does provide an estimate of the costs to various segments of the industry, it fails to exclude those who are not covered, for example, suppliers of foodservice establishments. It fails to use systems in existence and base the burden on the use of those systems. And, it fails to estimate the burden on the government in implementing and enforcing this program. For example, if the PACA system is used to investigate claims, the proposal makes no attempt to estimate the cost of using the PACA system. The PACA program, which clearly must be the default enforcement system for perishable agricultural commodities, is paid for by user fees and those fees are for the PACA program itself, not the labeling law. No estimate has been made of the burden of implementing and enforcing the labeling law on the PACA users. And, the proposal must be reconsidered in light of FDA's proposed rules dated February 3, 2003, on bio-terrorism that require all businesses to keep information on the immediate previous source and the immediate subsequent source of the commodity.

Accordingly, in view of the above, we believe the proposal fails to satisfy the most important purposes of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Sincerely,

Reginald L. Brown

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